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<b>Date</b>	May 4, 2006	<b>Phone</b>	<b>Fax</b>
<b>To</b>	<b>Mail Stop Petitions</b> Commissioner for Patents	571-272-0955	571-273-8300
<b>From</b>	W. Jackson Matney, Jr.	202-452-7000	202-452-7074
<b>Client/Matter No.</b>	95176562-005004		
<b>Re</b>	Applicant: Lloyd Wolfmberger, Jr. Serial No.: 09/940,545 Filed: August 29, 2001 Title: Plasticized Bone and Soft Tissue Grafts and Methods of Making and Using Same		
<b>Pages (w/cover)</b>	19		

Please see attached **Petition to Withdraw Holding of Abandonment** for filing with the United States Patent and Trademark office today.

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MAY - 4 2006

DOCKET NUMBER: 95176562-005004 (64230-00005USD2)  
PATENT

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Lloyd Wolfinbarger, Jr.

Serial No.: 09/940,545

Filed: August 29, 2001

For: Plasticized Bone and Soft Tissue Grafts and  
Methods of Making and Using Same§  
§  
§  
§  
§  
§  
§  
§  
§

Group Art Unit: 3732

Examiner: David Comstock

Mail Stop Petitions  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

## CERTIFICATE OF FACSIMILE 37 CFR 1.8

I hereby certify that this correspondence is being transmitted  
to the United States Patent and Trademark Office via  
facsimile to (571) 273-8300 on May 4, 2006.*Karen L. Hudson*  
SignaturePETITION TO WITHDRAW HOLDING OF ABANDONMENT

Applicant asks for withdrawal of a holding of abandonment of Application Serial No. 09/940,545 because a Notice of Appeal was timely filed while the application was pending. The records at the United States Patent & Trademark Office ("USPTO") confirm the following:

1. On March 15, 2005, the USPTO mailed an Office Action to Applicant. See Exhibit A, which is attached.
2. September 15, 2005, was the last date to file a response.
3. On September 14, 2005, in response to the March 15<sup>th</sup> Office Action, Applicant submitted a Notice of Appeal to the USPTO and requested a three-month extension of time. See Exhibit B, which is attached.
4. This submission occurred before the September 15<sup>th</sup> deadline.
5. On September 21, 2005, the USPTO mailed a Notice of Abandonment stating that a timely reply to an Office Action mailed March 15, 2005 had not been received. See Exhibit C, which is attached. This Notice is clearly in error.
6. The PAIR system still incorrectly indicates that this application has been abandoned.

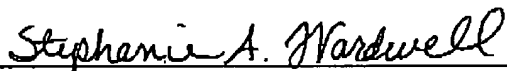
DOCKET NUMBER: 95176562-005004 (64230-00005USD2)  
PATENT

7. Applicant's representatives have contacted the Examiner and his Supervisory Primary Examiner to have the application reinstated. Neither would do so.

Because a Notice of Appeal was timely filed on September 14, 2005, before the deadline, Applicant respectfully petitions that the holding of abandonment be withdrawn.

If there are any questions regarding this petition or the application in general, a telephone call to the undersigned would be appreciated since this should expedite the prosecution of the application for all concerned.

Respectfully submitted,

  
Stephanie A. Wardwell  
Reg. No. 48,025

Date: May 4, 2006  
Baker & McKenzie LLP  
815 Connecticut Avenue, NW  
Washington, DC 20006  
(202) 452-7000  
(202) 452-7074 (fax)

# EXHIBIT A



## UNITED STATES PATENT AND TRADEMARK OFFICE

A  
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United States Patent and Trademark Office  
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www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/940,545	08/29/2001	Lloyd Wolfenburger JR.	58772.000004	5273

7590 03/15/2005

JENKINS AND GILCHRIST  
1445 ROSS AVENUE, SUITE 3200  
DALLAS, TX 75202

EXAMINER	
COMSTOCK, DAVID C	

ART UNIT	PAPER NUMBER
3732	

DATE MAILED: 03/15/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>		<b>Applicant(s)</b>	
	09/940,545		WOLFINBARGER ET AL.	
	<b>Examiner</b>		<b>Art Unit</b>	
	David Comstock		3732	

- The MAILING DATE of this communication appears on the cover sheet with the correspondence address -

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) ☒ Responsive to communication(s) filed on 15 November 2004 and 07 January 2005.

2a) ☒ This action is FINAL.                      2b) ☐ This action is non-final.

3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) ☒ Claim(s) 33 and 34 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.

6) ☒ Claim(s) 33 and 34 is/are rejected.

7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.

8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) ☐ The specification is objected to by the Examiner.

10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) ☐ All    b) ☐ Some \*    c) ☐ None of:

1. ☐ Certified copies of the priority documents have been received.

2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.

3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1) <input type="checkbox"/> Notice of References Cited (PTO-892) 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date <u>18 FEB 05</u>	4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) 6) <input type="checkbox"/> Other: _____
--	--

Application/Control Number: 09/940,545  
Art Unit: 3732

Page 2

### DETAILED ACTION

#### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claim 34 is rejected under 35 U.S.C. 102(e) as being anticipated by Boyce et al. (5,899,939).

Boyce et al. disclose a monolithic bone implant, i.e. whole bone or a portion of whole bone, 20 that is contacted with a liquid organic agent, i.e. a type of polyethylene glycol, and freeze-dried, i.e. lyophilized (see col. 1, lines 6-17; col. 2, lines 9-15; col. 4, lines 20-24 and 45-46; col. 4, line 53-65; col. 5, lines 21-29; and col. 6, lines 8-13, 45-46 and 51-52. It is noted that providing layers and demineralizing the implant are both optional; therefore, the scope of the disclosure includes mineralized bone that is not provided with the layers (id.).

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**Claim Rejections - 35 USC § 103**

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 33 is rejected under 35 U.S.C. 103(a) as being unpatentable over Boyce et al. (5,899,939) in view of Morse (5,333,626).

Boyce et al. disclose the claimed invention except for explicitly disclosing packaging of the implant. Morse discloses a similar invention that is packaged to preserve sterility and biologic potential in the implant and to avoid contamination and infection in the patient (see Fig. 1 and col. 1, lines 6-18; col. 2, lines 21-26; col. 3, lines 10-12, 21, 31-50, 57-61; col. 4, lines 8-12; col. 5, lines 57-65; col. 6, lines 5-25 and 43-46; and col. 7, lines 40-47). It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the bone implant as disclosed by Boyce et al. with packaging, in view of Morse, in order to preserve sterility and biologic potential of the bone implant and to avoid contamination and infection in the patient. It would have been further obvious to provide the liquid organic agent in any of numerous ranges of amounts, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.



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### ***Response to Arguments***

Applicant's arguments filed 15 November 2004 and 07 January 2005 regarding Livesey et al. have been fully considered and are persuasive. Accordingly, the rejections relying on this reference have been withdrawn.

However, Applicant's arguments pertaining to Boyce are not persuasive.

In response to Applicant's argument that Boyce does not anticipate Applicant's invention, it is noted that all of the disclosures in a reference must be evaluated for what they fairly teach one of ordinary skill in the art. *In re Smith*, 32 CCPA 959, 148 F.2d 351, 65 USPQ 167; *In re Nehrenberg*, 47 CCPA 1159, 280 F.2d 161, 126 USPQ 383; *In re Watanabe*, 50 CCPA 1175, 315 F.2d 924, 137 USPQ 350. It is neither possible nor desirable to recite every possible permutation of an invention within a patent. That freeze-drying is only recited in one example does not mean that Boyce does not anticipate the invention as claimed. On the contrary, Boyce discloses many features that "the bone-derived implant of *this invention* can optionally possess" (see, e.g. col. 4, lines 22-23 and 53, emphasis added). In example 1, still referring to "this invention," Boyce continues to disclose that the bone, which has already been shown to explicitly include a liquid organic agent such as a polyethylene glycol, can be freeze-dried (see col. 6, lines 45-46 and 50-52). Thus, "this invention," i.e. the invention of Boyce, includes within its scope bone that is contacted with a liquid organic agent and freeze-dried.

In response to applicant's argument that Boyce fails to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e.,

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Art Unit: 3732

Page 5

unaltered collagen fiber orientation) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Furthermore, this does not in any way prove that Boyce does not have liquid organic material throughout the entire freeze-drying process, since Boyce does not even discuss fiber orientation. However, Boyce does explicitly say that the various substances, including the liquid organic material, "can be incorporated into the bone-derived implant of *this invention* or any of its constituent layers during any stage of the assembly of the implant," which necessarily includes the stage wherein the bone is freeze-dried (col. 5, lines 24-28).

### Conclusion

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Application/Control Number: 09/940,545  
Art Unit: 3732

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to David Comstock whose telephone number is (571) 272-4710. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



D. Comstock  
07 March 2005



EDUARDO C. ROBERT  
PRIMARY EXAMINER

## EXHIBIT B

09/14/2005 16:05 FAX 2024527074

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<b>Date</b>	August 10, 2005	<b>Phone</b>	
<b>To</b>	Mail Stop Appeal	703-308-4357	571-273-8300
<b>From</b>	W. Jackson Maloney, Jr.	202-835-1678	202-452-7074
<b>Client/Matter No.</b>	95176562-005004		
<b>Re</b>	Applicant: Lloyd Wolfenbarger, Jr. Serial No.: 09/940,545 Filed: August 29, 2001 Title: Plasticized Bone and Soft Tissue Grafts ...		
<b>Pages (w/cover)</b>	4		

Please see attached Certificate of Transmission under 37 CFR 1.8, Notice of Appeal from the Examiner to the Board of Patent Appeals and Interferences, and Petition for Extension of Time Under 37 CFR 1.136(a) for filing with the United States Patent and Trademark office today.

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PAGE 14 \* RCVD AT 9/14/2005 4:04:10 PM [Eastern Daylight Time] \* SVR:USPTO-EFXRF-639 \* DNIS:2738300 \* CSID:2024527074 \* DURATION (mm-ss):01:24

PAGE 13/19 \* RCVD AT 5/4/2006 12:36:13 PM [Eastern Daylight Time] \* SVR:USPTO-EFXRF-2/2 \* DNIS:2738300 \* CSID: \* DURATION (mm-ss):04:42

09/14/2005 10:05 FAX 2024527074

BAKER &amp; MCKENZIE

002/004

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Karen L. Hudson

Typed or printed name of person signing Certificate

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For: Application Serial No. 09/940,545

- 1) Notice of Appeal from the Examiner to the Board of Patent Appeals and Interferences
- 2) Petition for Extension of Time Under 37 CFR 1.136(a)

This collection of information is required by 37 CFR 1.8. The information is required to obtain or retain a benefit by the public which is to be used by the USPTO in processing an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.14. The collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any continuation on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. (DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.)

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PAGE 24 \* RCVD AT 9/14/2005 4:04:10 PM [Eastern Daylight Time] \* SVR:USPTO-EFXRF-000 \* DNIS:2738300 \* CSID:2024527074 \* DURATION (mm:ss):01:24

PAGE 14/19 \* RCVD AT 5/4/2006 12:36:13 PM [Eastern Daylight Time] \* SVR:USPTO-EFXRF-2/2 \* DNIS:2738300 \* CSID: \* DURATION (mm:ss):04:42

# EXHIBIT C



## UNITED STATES PATENT AND TRADEMARK OFFICE

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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/940,545	08/29/2001	Lloyd Wolfmberger JR.	58772.000004	5273

EXAMINER
COMSTOCK, DAVID C

ART UNIT	PAPER NUMBER
J732	

JENKINS AND GILCHRIST  
1445 ROSS AVENUE, SUITE 3200  
DALLAS, TX 75202

DATE MAILED: 09/21/2005

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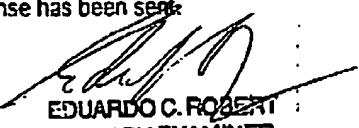
*e*

<b>Notice of Abandonment</b>	Application No.	Applicant(s)	
	09/940,545	WOLFINBARGER ET AL.	
	Examiner	Art Unit	
	David Cornstock	3732	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address--**

This application is abandoned in view of:

1. ☒ Applicant's failure to timely file a proper reply to the Office letter mailed on 15 March 2005.
  - (a) ☐ A reply was received on \_\_\_\_\_ (with a Certificate of Mailing or Transmission dated \_\_\_\_\_), which is after the expiration of the period for reply (including a total extension of time of \_\_\_\_\_ month(s)) which expired on \_\_\_\_\_.
  - (b) ☐ A proposed reply was received on \_\_\_\_\_, but it does not constitute a proper reply under 37 CFR 1.113 (a) to the final rejection.  
(A proper reply under 37 CFR 1.113 to a final rejection consists only of: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114).
  - (c) ☐ A reply was received on \_\_\_\_\_ but it does not constitute a proper reply, or a bona fide attempt at a proper reply, to the non-final rejection. See 37 CFR 1.85(a) and 1.111. (See explanation in box 7 below).
  - (d) ☒ No reply has been received.
2. ☐ Applicant's failure to timely pay the required issue fee and publication fee, if applicable, within the statutory period of three months from the mailing date of the Notice of Allowance (PTOL-85).
  - (a) ☐ The issue fee and publication fee, if applicable, was received on \_\_\_\_\_ (with a Certificate of Mailing or Transmission dated \_\_\_\_\_), which is after the expiration of the statutory period for payment of the issue fee (and publication fee) set in the Notice of Allowance (PTOL-85).
  - (b) ☐ The submitted fee of \$\_\_\_\_\_ is insufficient. A balance of \$\_\_\_\_\_ is due.  
The issue fee required by 37 CFR 1.18 is \$\_\_\_\_\_. The publication fee, if required by 37 CFR 1.18(d), is \$\_\_\_\_\_.
  - (c) ☐ The issue fee and publication fee, if applicable, has not been received.
3. ☐ Applicant's failure to timely file corrected drawings as required by, and within the three-month period set in, the Notice of Allowability (PTO-37).
  - (a) ☐ Proposed corrected drawings were received on \_\_\_\_\_ (with a Certificate of Mailing or Transmission dated \_\_\_\_\_), which is after the expiration of the period for reply.
  - (b) ☐ No corrected drawings have been received.
4. ☐ The letter of express abandonment which is signed by the attorney or agent of record, the assignee of the entire interest, or all of the applicants.
5. ☐ The letter of express abandonment which is signed by an attorney or agent (acting in a representative capacity under 37 CFR 1.34(a)) upon the filing of a continuing application.
6. ☐ The decision by the Board of Patent Appeals and Interference rendered on \_\_\_\_\_ and because the period for seeking court review of the decision has expired and there are no allowed claims.
7. ☒ The reason(s) below:  
  
 Examiner contacted applicant's representative of record, Jenkins & Gilchrist, and was informed that they are not prosecuting the application and that no response has been sent.

  
**EDUARDO C. ROBERT**  
 PRIMARY EXAMINER

*oe*

Petitions to revive under 37 CFR 1.137(a) or (b), or requests to withdraw the holding of abandonment under 37 CFR 1.181, should be promptly filed to minimize any negative effects on patent term.

U.S. Patent and Trademark Office  
PTOL-1432 (Rev. 04-01)

Notice of Abandonment

Part of Paper No. 091605

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